

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	FINAL
FOR BENEFICIAL WATER USE PERMIT)	ORDER
NO. 41205-s41QJ BY ALBERT C.)	
BERGER)	

* * * * *

On April 2, 1984, the Department of Natural Resources and Conservation issued a Show Cause Order to Objector Montana Power Company (hereafter, "MPC").

I. Memorandum of Cause by MPC

A. MPC's response to the Show Cause Order also reasserted several of their arguments made in response to the Proposal for Decision in Don Brown. The Department incorporates its response to MPC's arguments numbered 2, 3, 6, 8, 10 as set forth in the Final Order in Don Brown, April 24, 1984.¹

- ¹ These MPC arguments are:
- 2. Unappropriated water in the proposed source is non-existent.
 - 3. Property rights will be adversely affected.
 - 6. Evidence shows the Power Company's water rights are presently not being satisfied.
 - 8. The Order changes the statutory burden of proof.
 - 10. All Final Orders issued by the Department are afflicted with errors of law and are otherwise improper, and the Power Company has appealed every Final Order which adversely affects its rights.

MPC's argument number 10 is too vague to be responded to with particularity. MPC suggests the hearing officer look at the docket as evidence that MPC has presented arguments that Don Brown is afflicted with errors of law or otherwise improper. MPC's complaint, however, is still too vague to provide the Department any substantive clue as to the errors MPC claims infect Don Brown.

FINAL ORDER


1. MPC's objections to Beneficial Water Use Permit Application No. 41205-s41QJ by Albert C. Berger are hereby declared invalid and are stricken.

2. Subject to the terms, restrictions, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 41205-s41QJ is hereby granted to Albert C. Berger to appropriate 7 gallons per minute up to 1.72 acre-feet per year for lawn and garden uses on .75 acres of land located in Lot 1, Seibold Missouri River Tracts, SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 17 North, Range 2 West, Cascade County, Montana. In no event shall these waters be diverted prior to April 15 nor subsequent to October 15 of any given year. The source of supply shall be the Missouri River at a point in the Lot 1, Seibold Missouri River Tracts, SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 17 North, Range 2 West, in Cascade County, Montana. The priority date for this Permit shall be October 1, 1981 at 9:30 a.m.

- A) This permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided for by Montana Law.
- B) The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

- C) The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, Permittee shall cause and otherwise allow the waters to remain in the source of supply.
- D) The Permittee shall diligently adhere to these terms and conditions. Failure to adhere to the terms and conditions may result in the revocation of this Permit.
- E) This permit is subject to the existing rights of the Montana Fish and Game Commission established by appropriation made pursuant to Chapter No. 345, Montana Session Laws of 1969, for the preservation of fish and wildlife habitat, and also subject to the final determination of such existing rights by a court of competent jurisdiction.

DONE this 1 day of November 1984.



Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6605

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act, Title 2, Part 4, Chapter 7, by filing a petition for judicial review in the appropriate District Court within (30) days of service hereof.

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on Nov. 5, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by ALBERT C. BERGER, Application No. 41205-s41QJ, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Albert C. Berger, Route 1 so., Box 2122, Cascade, MT 59421
2. Montana Power Co., 40 East Broadway, Butte, MT 59701
3. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 *Hand deliver*
4. Sam Rodriguez, Lewistown Field Office (inter-departmental mail)
5. Gary Fritz, Administrator, Water Resources (hand deliver)

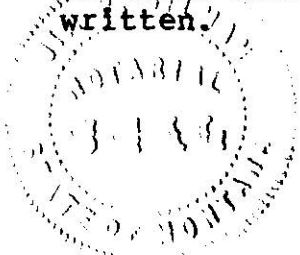
DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by *Donna Elser*

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 5th day of November, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Sam P. Gilman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) ORDER TO SHOW CAUSE
NO. 41205-s41QJ BY ALBERT C. BERGER)

* * * * *

The objection filed with the Department of Natural Resources and Conservation by the Montana Power Company to the above-named application is identical in language to a number of objections previously filed by this entity with respect to similar applications. These objections all claim generally that there is a lack of unappropriated water available for the applicants' purposes, and that diversions made pursuant to these applicants' plans would result in adverse affect to the water rights claimed by the Montana Power Company. See MCA 85-2-311(1a) and (1b).

No claim is made either expressly or by implication in the present objection that the Applicant's proposed use is not a beneficial one, or that the Applicant's proposed means of diversion are not adequate for his purposes. See MCA 85-2-311(1d) and (1c). Nor has the Department in its own behalf indicated any concerns for the existence of these statutory criteria for a new water use permit. See generally, MCA 85-2-310(2).

Commencing with the Proposal for Decision In re Brown, and continuing through a number of applications where the Montana Power Company presented evidence at hearings held pursuant thereto, the Department of Natural Resources and Conservation has concluded that the scope and extent of Montana Power Company's rights to the use of the water resource as indicated by the evidence therein did not warrant denial of the respective applications for new water use permits. Since the instant objection alleges similar matters to those involved in prior hearings, hearings on the factual issues suggested by the present controversy threaten a waste of time and undue time and expense to the parties involved. See generally, MCA 2-4-611(3) (1981); MCA 85-2-309 (1982). The principles of stare decisis dictate that Montana Power Company be compelled to make a preliminary showing that its objection to the instant application has merit.

WHEREFORE, the Montana Power Company is hereby directed to show cause why its objection should not be stricken and the instant application approved according to the terms thereof. Said Objector shall file with the Department within 20 days of the service of this Order, affidavits and/or other documentation demonstrating that the present Applicant is not similarly situated with respect to prior applicants for whom permits have been proposed over this Objector's objections; and/or offers of proof as to matters not presented in prior hearings, which matters compel different results herein; and/or argument that the proposed dispositions in such prior matters were afflicted by error of law

or were otherwise improper; and/or any other matter that demonstrates that the present objection states a valid cause for denial or modification of the instant application.

DONE this 24th day of April, 1984.

Gary Fritz
Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6605

AFFIDAVIT OF SERVICE
ORDER TO SHOW CAUSE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 24, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by ALBERT C. BERGER, Application No. 41205-s41QJ, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Albert C. Berger, Route 1 so., Box 2122, Cascade, MT 59421
2. Montana Power Co., 40 East Broadway, Butte, MT 59701
3. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 (hand-delivered)
4. Sam Rodriguez, Lewistown Field Office (inter-departmental mail)
5. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 24th day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



James P. Gilman

Notary Public for the State of Montana
Residing at Helena Montana
My Commission expires 1-21-87